

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**EYM KING OF MICHIGAN, LLC d/b/a.
BURGER KING**

Respondent

and

CASE 07-CA-118835

**MICHIGAN WORKERS ORGANIZING
COMMITTEE**

Charging Party

**COUNSEL FOR THE GENERAL COUNSEL’S RESPONSE TO
THE BOARD’S NOTICE TO SHOW CAUSE**

In response to the Notice to Show Cause issued by the Board in the above-captioned case on October 10, 2018, Counsel for the General Counsel requests that the case not be remanded to the Administrative Law Judge for further proceedings in light of the Board’s decision in *The Boeing Co.*, 365 NLRB No. 154 (2017), and that the remaining Complaint allegations be dismissed.

Outstanding Complaint Allegations

On August 15, 2018, the Board issued an Order in the above captioned matter, 366 NLRB No. 156, affirming the ALJ’s findings in part, but severing two rule allegations. As noted in FN 3:

“Complaint paragraphs 16(b)–(c) and 17(b)–(c) allege that the Respondent violated Sec. 8(a) (1) by unlawfully maintaining overly broad employee handbook rules. We shall sever these complaint allegations and retain them for further consideration, except the allegations in paragraphs 16(b) and 17(b) regarding the requirement that employees treat coworkers and others “with courtesy and

respect,” as no exceptions were filed to the judge’s dismissal of those allegations”.

The severed rules as pled in the Complaint read as follows:

CPT paragraph 16 (c) Confidential Information¹

“EYM King of Michigan, LLC, entrusts its Employees with important information related to its businesses. The nature of this relationship requires maintenance of confidentiality. Your employment with EYM King of Michigan, LLC obligates you to maintain confidentiality of information, even after you are no longer employed with EYM King of Michigan, LLC. For instance, you might know about company earnings, food preparation procedures and plans to buy or sell other products or property, or changes in management. These are examples of sensitive business matters considered confidential and proprietary trade secrets. If revealed the result could be the loss of a business advantage. This includes, but is not limited to, the discussion of any information relating to threatened legal claims or lawsuits against the Company. If you are contacted by an attorney or an investigator about company business, your response should always be to refer such persons to EYM King of Michigan, LLC.'s corporate office at (214) 819-3800 — Human Resources Department, even if the person states that he/she represents the Company, unless your Supervisor has given you permission to speak with the individual.

Any violation of confidentiality seriously injures EYM King of Michigan, LLC.'s reputation and effectiveness. Do not discuss EYM King of Michigan, LLC. business with anyone who does not work for the Company. Never discuss business transactions with anyone who does not have a direct association with the transaction. Even casual remarks can be misinterpreted and repeated, so develop the personal discipline necessary to maintain confidentiality.

If you are questioned by someone outside the company or your department and you are concerned about the appropriateness of giving that person certain information, remember that you are not required to answer, and that we do not wish you to do so. Instead, as politely as possible, refer the request to your Supervisor.

No one is permitted to remove or make copies of any EYM King of Michigan, LLC. records, reports, or documents without prior management approval”.

¹ On about March 14, 2014, this rule was superseded by the rule in Complaint paragraph 17(c).

Complaint paragraph 17 (c) Confidential Information

“EYM King of Michigan, LLC entrusts its Employees with important information confidential, proprietary and trade secrets related to its businesses and the business of Burger King. Applicable state and federal laws impose various fiduciary obligations upon you as an employee (even after you are no longer employed with EYM King of Michigan, LLC) regarding maintaining the confidentiality of such information, against misusing or misappropriating of such information, engaging in unlawful or unfair competition, using such information to engage in securities transactions, and protecting the Company’s trade secrets, trade dress, trademarks, and copyrights. You are expected at all times to abide by your fiduciary obligations and other requirements of local, state, and federal statutory, regulatory, and common law.

No one is permitted to remove or make copies of any EYM King of Michigan, LLC records, reports, or documents without prior management approval”.

The ALJ found these rule(s) lawful under *Lutheran Heritage Village*, indicating that:

“the rule(s) applies to information other than wages and terms and conditions of employment that would be useful to a competitor. Restrictions re copying would be read to apply to documents EEs were not entitled to possess, and to the extent NLRB investigators need documents they could subpoena them”. (ALJD P 12).

Legal Analysis

In *The Boeing Company*, 365 NLRB No. 154, slip op at p 3-4, (December 14, 2017), the Board articulated what it identified as a new standard in determining whether an employer rule is unlawful:

“[W]hen evaluating a facially neutral policy, rule or handbook provision that, when reasonably interpreted, would potentially interfere with the exercise of NLRA rights, the Board will evaluate two things:

- (i) the nature and extent of the potential impact on NLRA rights and (emphasis in original) and
- (ii) legitimate justifications associated with the rule.”

The Board noted that as a result of the balancing test, it will delineate three categories of employment policies, rules and handbook provisions. The Board noted that the categorization of such rules represent an application of the new balancing test, but are not part of the test itself.

The Board defined a Category 1 rule as follows :

“Category 1 will include rules that the Board designates as lawful to maintain, either because (i) the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of NLRA rights; or (ii) the potential adverse impact on protected rights is outweighed by justifications associated with the rule. Examples of Category 1 rules are the no-camera requirement in this case, the “harmonious interactions and relationships” rule that was at issue in ***William Beaumont Hospital***, and other rules requiring employees to abide by basic standards of civility”.

Certain types of confidentiality rules, like the rules above, belong in Category 1, because they are rules banning the discussion of confidential, proprietary, or customer information that make no mention of employee or wage information. The vast majority of conduct affected by these types of rules is unrelated to Section 7. The Board has held that a broad ban on discussing confidential or proprietary information, or trade or business secrets, was not thought to affect Section 7 rights unless terms and conditions of employment were specifically included. The Board found that these rules would not be read as prohibiting discussion of wages or terms or conditions of employment.² In addition, the potential adverse impact on protected rights is outweighed by justifications associated with the rule including protection from lawsuits and penalties for failure to comply with federal and state laws.

² ***Lafayette Park Hotel***, 326 NLRB 824, 826 (1998), *enforced mem.*, 203 F.3d 52 (D.C. Cir. 1999); ***Super K-Mart***, 330 NLRB 263, 263 (1999)

Traditional rules prohibiting employee use of employer logos and trademarks also belong in Category 1. Examples of such rules are:

-Employees are forbidden from using the Company's logos for any reason.³

-Do not use any Company logo, trademark, or graphic [without] prior written approval.⁴

Most activity covered by this rule is unprotected, including use of employer intellectual property for unprotected personal gain or using it to give the impression one's activities are condoned by the employer. Although some protected concerted activity might fall under such a rule, including fair use of an employer's intellectual property on picket signs and leaflets, usually employees will understand this type of rule as protecting the employer's intellectual property from commercial and other non-Section 7 related uses.

Furthermore, even where employees would reasonably interpret such a rule to apply to fair use of an employer's logos as part of protected concerted activity, it is unlikely that the rule would actually cause them to refrain from so using them. The types of protected concerted activity implicated by these rules are usually fairly advanced in terms of employee organization, and employees are unlikely to be deterred from fair use of a logo on a picket sign by a rule in an employee manual.

³ *Boch Honda*, 362 NLRB No. 83, slip op. at 1–2 (Apr. 30, 2015) (finding rule unlawful under *Lutheran Heritage*), enforced, 826 F.3d 558 (1st Cir. 2016).

⁴ *Giant Food LLC*, Case 05-CA-064793, et al., Advice Memorandum dated Mar. 21, 2012, at 4 (finding that under *Lutheran Heritage* this rule was unlawfully overbroad)

Finally, even in the event employees did refrain from fair use of an employer's logo or intellectual property, such chill would have only a peripheral effect on Section 7 rights. Given the substantial legitimate interests behind such rules, and the little, if any, adverse impact on NLRA-protected activity, these rule types should be in Category 1.⁵

Accordingly, for all the above reasons, Counsel for General Counsel respectfully requests that Complaint paragraphs 16 (c) and 17 (c) be dismissed by the Board.

Dated at Detroit, Michigan, this 9th day of November, 2018.

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⁵ *See Schwan's Home Service*, 364 NLRB No. 20, slip op. at 16 n.34 (Miscimarra, dissenting in part) (noting that Target had incurred \$162 million in expenses as a result of a data breach involving customer information).

I certify that on November 9, 2018, I emailed copies of the Counsel for the General Counsel's Response to the Board's Notice to Show Cause to the following parties of record:

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